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MAJLIS BANDARAYA MELAKA BERSEJARAH v. BADAN PENGURUSAN BERSAMA PLAZA HANG TUAH

COURT OF APPEAL, PUTRAJAYA
CHE MOHD RUZIMA GHAZALI JCA
HASHIM HAMZAH JCA
B AZIZUL AZMI ADNAN JCA
[CIVIL APPEAL NO: M-01(NCVC)(W)-578-10-2021]
31 JULY 2024

Abstract – *In interpreting a statute, the words used in the statute must be read in their entire context, in their grammatical and ordinary sense, and harmoniously blend with the scheme and the object of the statute and, the intention of the Legislature. Hence, the word 'purchaser' in s. 23 of the Building and Common Property (Maintenance and Management) Act 2007, simply means purchaser of a parcel, and it does not refer to the owner of the parcel who did not purchase it from the developer.*

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LAND LAW: *Strata title – Joint management body ('JMB') – Statutory body established under s. 4 of Building and Common Property (Maintenance and Management) Act 2007 ('BCPA') – Claim for maintenance charges and contribution to sinking fund against local authority, proprietor of strata parcels – Whether claim fell under BCPA – Whether maintenance charges and contribution to sinking fund under BCPA directed to developer and 'purchaser' – Whether local authority fell under definition of developer or purchaser – Whether 'owner' or proprietor of parcel liable to pay maintenance charges and contribution to sinking fund – Whether local authority obliged for claims*

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The appellant, Majlis Bandaraya Melaka Bersejarah ('MBMB'), a statutory body established under the Local Government Act 1976 ('LGA'), who owned five pieces of land in the city centre of Melaka ('master titles') entered into a joint venture agreement ('JVA') to develop the master titles with a developer, Atlantic Potential Sdn Bhd ('developer'). The end result of the JVA was the shopping complex known as Plaza Hang Tuah. As a consideration from the developer under the JVA, MBMB was given a food court with a total floor area of 16,000 sq ft at level 4 ('food court') and taxi parking bays with a total floor area of 76,000 sq ft at level 6 and, upon the execution of the JVA, MBMB would receive RM83,940 from the developer. The respondent, Badan Pengurusan Bersama Plaza Hang Tuah ('JMB'), a statutory body, was established pursuant to s. 4 of the Building and Common Property (Maintenance and Management) Act 2007 ('BCPA') to maintain and manage the common property of Plaza Hang Tuah. Part of the JMB's power under the BCPA was to collect from the purchasers the maintenance and management charges in proportion to the allocated share units of their

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respective parcels. When the developer was wound up, no licensed land surveyor was appointed to assign the share units to each parcel owner. Hence, upon being advised by the Commissioner of Building ('COB'), the JMB took the initiative to appoint a licensed land surveyor to allocate the share units to the parcel owner. MBMB was the proprietor of the strata title parcels for the food court. The JMB's claim against MBMB was for payment of the maintenance charges and contribution to the sinking fund for the years 2012 to 2014 amounting to RM715,163.40. In disputing the JMB's claim, MBMB raised the following defences: (i) The JMB's claim was time-barred pursuant to the Public Authorities Protection Act 1948; (ii) the MBMB was not liable to pay the maintenance charges and contribution to the sinking fund as it was neither a developer nor a purchaser in accordance with BCPA; (iii) the JMB's claim was computed in sq ft and not in share units as required under the BCPA; and (iv) no maintenance works were carried out by the JMB on the common property. MBMB counterclaimed against the JMB for the refund of the maintenance charges and contribution to the sinking fund in the sum of RM249,115.30 being paid for the year 2015 as consideration for the JMB to carry out the maintenance of the common property of the food court which wholly failed. MBMB's counterclaim rested on two causes of action, the total failure of consideration and unjust enrichment. The court allowed the JMB's claim and dismissed MBMB's counterclaim. Hence, this appeal by MBMB.

Held (allowing MBMB's appeal on JMB's main claim; allowing MBMB's appeal in part on counterclaim)
Per Che Mohd Ruzima Ghazali JCA delivering the judgment of the court:

(1) The SMA 2013 only came into force on 1 June 2015 in Malacca. Hence, the JMB's claim which was for the year 2012 to 2014 should fall under the preview of the BCPA and not the SMA 2013. Based on the definitions of 'housing developer', 'housing development', 'licensed housing developer' and 'Housing Development Account' under s. 3 of the HDA, a housing developer must be a legal entity that constructs a housing development of more than four units of houses for sale, involves in the collection of money from buyers, is licensed and maintains a housing development account. MBMB only owned the master title, was not involved in the construction of Plaza Hang Tuah, was not licensed under the HDA and had not opened or maintained a housing development account. Therefore, MBMB was not a developer within the meaning of the BCPA. (paras 21 & 28)

(2) Section 23 of the BCPA defined 'purchaser' as the purchaser of a parcel, with no further clarification or explanation to indicate that a 'purchaser' should also include the owner or proprietor of the parcel. All provisions involving the right and liability to pay the maintenance charges and contribution to the sinking fund under the BCPA are only directed to the

developer and 'purchaser'. Thus, whichever canons of construction is applied to the meaning of the 'purchaser' under the BCPA, the result would be the same, that is, 'purchaser' does not refer to the owner of the parcel who did not purchase it from the developer. (paras 29 & 31)

(3) In interpreting a statute, the courts cannot usurp the power of the Legislator to make, mend, reframe or modify it. If the Legislature had intended to include the 'owner' or the proprietor of a parcel as one of the categories of person that is liable to pay the maintenance charges and contribution to the sinking fund under the BCPA, it can even adopt the same interpretation of 'purchaser' that is used in the HDA since such interpretation of 'purchaser' is wide enough to include 'owner'. The word 'purchaser' as interpreted in s. 2 of the BCPA did not include the 'owner' or 'proprietor' of a parcel. Hence, MBMB had no obligation to pay and the JMB had no power to collect the maintenance charges and contribution to the sinking fund under the BCPA. (paras 33, 35, 36 & 38)

(4) Payment of the maintenance charges and contribution to the sinking fund is an obligation under a specific law, previously under the BCPA and presently under the SMA. The obligation to pay is on the 'purchaser' of the parcel. If MBMB was the purchaser of the food court which was also a parcel under the master title, the obligation to pay the maintenance charges and contribution to the sinking fund is mandated by the BCPA. The payment of those charges had nothing to do with the MBMB's public duty. The fact that MBMB was expressly empowered to develop the master title under paras. 101(gg) and (hh) of the LGA, did not negate MBMB's duty to pay those charges under the BCPA if MBMB was categorised as a 'purchaser' of the food court. Furthermore, the statement of account for the maintenance charges and contribution to the sinking fund were running accounts, and therefore, MBMB could not rely on the defence of limitation under the PAPA or the Limitation Act 1953. The MBMB's agreement to make payment or not, was irrelevant if it was obliged under the law to pay the maintenance charges and contribution to the sinking fund under the BCPA. Contracting out the provision of a statute is forbidden and the contract entered would be void. (paras 39 & 41)

(5) The developer had been wound-up and no licensed land surveyor was appointed by the developer at that material time to assign the share units of the parcel to the purchaser. The JMB had taken the right step to appoint the licensed land surveyor to allocate the share units since the developer was no longer in existence. The JMB was the right person or body to step into the shoes of the wound-up developer and to act in accordance with the law to enable the maintenance of Plaza Hang Tuah. (para 40)

(6) MBMB, having no obligation to pay the maintenance charges and contribution to the sinking fund to JMB and the fact that SMA only came into force in Malacca on 1 June 2015, the JMB had no power to collect or make any claim for the payment of the maintenance charges and contribution to the sinking fund from MBMB. Therefore, MBMB was entitled to get back part of the money paid to the JMB. (para 43)

Case(s) referred to:

Black-Clawson International Ltd v. Papierwerke Waldhof-Aschaffenburg AG [1975] 1 All ER 310 ***(refd)***
Crawford v. Spooner [1846] 6 Moore PC 1 ***(refd)***
Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd [2015] 2 CLJ 453 FC ***(refd)***
Duport Steels Ltd & Ors v. Sirs & Ors [1980] 1 WLR 142 ***(refd)***
Ekuiti Setegap Sdn Bhd v. Plaza 393 Management Corporation [2019] 2 CLJ 592 CA ***(refd)***
Fothergill v. Monarch Airlines [1980] 3 WLR 209 ***(refd)***
Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***
Gulwant Singh v. Abdul Khalik [1965] CLJU 47; [1965] 1 LNS 47 FC ***(refd)***
Lai Chin Wah & Anor v. Sitrac Corporation Sdn Bhd [2023] 6 CLJ 232 CA ***(refd)***
Lim Geak Liang v. East West Umi Insurance Bhd [1997] 4 CLJ 405 FC ***(refd)***
London Transport Executive v. Betts [1959] AC 213 ***(refd)***
Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors [2020] 10 CLJ 1 FC ***(refd)***
R Rama Chandran v. Industrial Court Of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***
Tan Kim Chuan & Anor v. Chandu Nair Krishna Nair [1991] 1 CLJ 682; [1991] 1 CLJ (Rep) 441 SC ***(refd)***
UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor [2010] 9 CLJ 785 FC ***(refd)***

Legislation referred to:

Building and Common Property (Maintenance and Management) Act 2007 (repealed), ss. 2, 4, 8, 23
Housing Development (Control and Licensing) Act 1966, s. 3
Local Government Act 1976, ss. 3, 13, 101(gg), (hh)
Public Authorities Protection Act 1948, s. 2
Rules of Court 2012, O. 18 r. 7(1)
Strata Management Act 2013, ss. 2, 25, 30(1), 149
Strata Titles Act 1985, s. 4

For the appellant - Jagjit Singh, Yap Bell Pung, Joshua Vijayan Dhamaraj, Tan Cheng Kiat & Gan Jie Ying; M/s Bell & Lee
For the respondent - Amardas Jethanand & Yok Jiang Lin; M/s K P NG & Amardas

[Editor's note: For the High Court judgment, please see Badan Pengurusan Bersama Plaza Hang Tuah v. Majlis Bandaraya Melaka Bersejarah [2021] CLJU 2060; [2021] 1 LNS 2060 (overruled).]

Reported by S Barathi

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JUDGMENT

Che Mohd Ruzima Ghazali JCA:

Introduction

B **[1]** Majlis Bandaraya Melaka Bersejarah (appellant/defendant), a statutory body established under the Local Government Act 1976 - Act 171 (LGA 1976), was ordered by the High Court of Malacca to pay RM715,163.40 to the Badan Pengurusan Bersama Plaza Hang Tuah (respondent/plaintiff), a statutory body created under the Building and Common Property (Maintenance and Management) Act 2007 – Act 663 (BCPA 2007), being the C maintenance charges and contribution to the sinking fund for the years of 2012 to 2014. The High Court also dismissed the appellant's/defendant's counterclaim to get back the sum paid to the plaintiff/respondent totalling RM249,115.30 for total failure of consideration in respect of the maintenance charges and contribution to the sinking fund for the year 2015. D Aggrieved by the said order of the High Court, the appellant/defendant appealed.

[2] For ease of reference, parties will be referred to by their acronym, MBMB for the appellant/defendant and JMB for the respondent/plaintiff.

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Brief Facts Of The Case

[3] MBMB owns five pieces of land in the city centre of Melaka (the master titles). By an agreement dated 8 March 1994, MBMB entered into a joint venture agreement (the JVA) to develop the master titles with a developer known as Atlantic Potential Sdn Bhd (the developer).

F **[4]** The end result of the JVA was the shopping complex in Melaka city centre known as Plaza Hang Tuah. As a consideration from the developer under the JVA, MBMB was given a food court with a total floor area of 16,000 sq ft at level 4 (the food court) and taxi parking bays with a total floor area of 76,000 sq ft at level 6 and upon the execution of the JVA, MBMB G will receive RM83,940 from the developer.

[5] JMB was established on 28 August 2008 pursuant to s. 4 of the BCPA 2007 to maintain and manage the common property of Plaza Hang Tuah. Part of the JMB's power under BCPA 2007 is to collect from the purchasers the maintenance and management charges in proportion to the allocated H share units of their respective parcels.

[6] At the time that the developer was wound up, no licensed land surveyor was appointed to assign the share units to each parcel owner. When JMB was formed in 2006, upon being advised by the Commissioner of Building (COB), JMB took the initiative to appoint Jurukur Saharuddin I El-Asas, a licensed land surveyor, to allocate the share units to the parcel

owner, which was done on 5 January 2015. MBMB is the proprietor of the strata title parcels for the food court, with a total area of 13,509 sq ft or with a total share of 1,883 units.

[7] JMB's claim against MBMB is for payment of the maintenance charges and contribution to the sinking fund for the years 2012 to 2014. MBMB has to pay the maintenance charges at the rate of RM1.35 per sq ft or RM9.59 per share unit, and the contribution to the sinking fund at the rate of 12 cents per sq ft or 96 cents per share unit. The total amount claimed by JMB against MBMB is RM715,163.40.

[8] MBMB disputed JMB's claim and raised the four main defences. First, JMB's claim is time-barred pursuant to the Public Authorities Protection Act 1948. Second, MBMB is not liable to pay the maintenance charges and contribution to the sinking fund as it is neither a developer nor a purchaser in accordance with BCPA 2007. Third, JMB's claim was computed in sq ft and not in share units as required under BCPA 2007, and fourth, no maintenance works were carried out by JMB on the common property. MBMB counterclaimed against JMB for the refund of the maintenance charges and contribution to the sinking fund in the sum of RM249,115.30 being paid for the year 2015 as consideration for JMB to carry out the maintenance of the common property of the food court which was wholly failed. MBMB's counterclaim rests on two causes of action, the total failure of consideration and unjust enrichment.

High Court's Decision

[9] On the facts of the case, MBMB entered into a private commercial contract with JMB and MBMB was not carrying out a public or statutory duty. In such circumstances, the 36-month limitation period prescribed in s. 2 of the Public Authorities Protection Act 1948 (PAPA 1948) is not available to MBMB. The court is not with MBMB on the first issue.

[10] On MBMB's liability to pay the maintenance charges and contribution to the sinking fund, the court observed that counsel for MBMB submitted on the Strata Management Act 2013 (SMA 2013), which came into effect only on 1 June 2015. As the events of this action pre-date 1 June 2015, the SMA 2013 is not applicable. The court is also not with MBMB on the second issue.

[11] As for the third issue, JMB was formed on 28 August 2008 and at the material time, MBMB was the registered proprietor of the food court. JMB undertook the process of obtaining the share units pursuant to BCPA 2007, which was in force at that time. MBMB did not provide any evidence at the trial to dispute or challenge the allocation of share units. JMB issued a number of invoices to MBMB based on share units and the charges based on share units were approved at the sixth AGM. MBMB paid JMB for the

arrears of the maintenance charges and contribution to the sinking fund for the year 2015 for the food court based on share units and JMB issued to MBMB a letter dated 31 March 2016 and in that letter, the sum of RM715,613.40 was computed based on share units. Based on the given facts, the court is not with MBMB in the third issue.

[12] As regards to MBMB's allegation that JMB failed to maintain the common property, the court noted that none of the witnesses testified that JMB did not maintain the common area. The testimony of PW1 and PW2, who were credible and reliable independent witnesses, gave contrary evidence as to MBMB's allegation. The court found that MBMB's contention on the fourth issue was misconceived. MBMB should not tie up JMB's obligation to maintain the common property with MBMB's obligation to pay the maintenance charges and contribution to the sinking fund. Each obligation is separate and independent. MBMB failed in the fourth issue.

[13] The court allowed JMB's claim and dismissed MBMB's counterclaim.

The Appeal

[14] MBMB had listed 14 main reasons and 31 sub-reasons in the memorandum of appeal dated 6 December 2021. Before us, counsel for MBMB reiterated the three main issues raised in the statement of defence, which were argued before the High Court and added another issue raised during the trial by counsel for JMB regarding a disputed agreement allegedly entered between the parties by virtue of the MBMB's meeting minutes dated 1 April 2015. Thus, four issues in the main action raised by MBMB were:

(i) whether MBMB is entitled to the limitation period of three years under s. 2 of the PAPA 1948, which is absolute;

(ii) whether MBMB is a 'purchaser' under the definition of BCPA 2007 upon whom BCPA 2007 targeted the obligations to pay the maintenance charges and contribution to the sinking fund;

(iii) whether JMB has proven its claim on the 'share unit' basis mandated by the BCPA 2007 and Strata Titles Act 1985; and

(iv) whether there is *consensus ad idem* on the disputed contract alleged to have been entered into between the parties by virtue of the MBMB's meeting minutes dated 1 April 2015 (2015 agreement).

As for the counterclaim, the only issue raised by MBMB is whether there was a total failure of consideration of the 2015 agreement.

Our Decision

[15] The law on appellate intervention is clear. An appellate court could interfere with findings of fact by the trial court on 'the plainly wrong test' principle. See the Federal Court decision in *Gan Yook Chin & Anor v. Lee Ing*

Chin & Ors [2004] 4 CLJ 309; [2005] 2 MLJ 1; *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2015] 2 CLJ 453; [2015] 2 MLJ 441; *UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor* [2010] 9 CLJ 785; [2018] supp MLJ 363; and *Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors* [2020] 10 CLJ 1; [2020] 12 MLJ 67 (*Ng Hoo Kui*'s case).

[16] In *Ng Hoo Kui*'s case, the Federal Court made the following observation:

> [54] Premised on *Watt (or Thomas) v. Thomas* and Henderson Lord Reed qualified that the 'plainly wrong' test only comes into play in the absence of the following:
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> (a) material error of law;
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> (b) critical factual finding which had no basis in evidence;
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> (c) demonstrable misunderstanding of relevant evidence; and
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> (d) demonstrable failure to consider relevant evidence.
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> In the presence of any of the above, the appellate court is entitled to set aside the judgment of the trial court without having to consider the 'plainly wrong' test. Lord Reed reiterates that these four identifiable errors are however not exhaustive. It appears that the other examples which could be added to this non-exhaustive list, are as listed in *Watt (or Thomas) v. Thomas* namely:
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> (a) there is misdirection by the judge;
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> (b) there is no evidence to support a particular conclusion;
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> (c) there is material inconsistencies or inaccuracies; and
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> (d) the trial judge fails to appreciate the weight and bearing of circumstances admitted or proved.

[17] Coming back to the appeal before us, the clash between JMB and MBMB involves two entities where both are the creatures of statute. JMB is a creature of statute under BCPA 2007. Under the law, JMB is established only after a building or land intended for subdivision into parcels has been completed. Section 4 of the BCPA provides as follows:

> Establishment of a Joint Management Body
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> 4. (1) Where a building or land intended for subdivision into parcels has been completed:
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> (a) before the commencement of this Act and vacant possession of the parcels has been delivered by the developer to purchasers but the management corporation has not come into existence, a Joint Management Body shall be established consisting of the developer and the purchasers upon the convening of the first meeting not later than twelve months from the commencement of this Act; and

(b) on or after the commencement of this Act, a Joint Management Body shall be established consisting of the developer and the purchasers upon the convening of the first meeting not later than twelve months from the date of delivery of vacant possession of the parcels to the purchasers.

(2) The Body established by subsection (1) shall be a body corporate having perpetual succession and a common seal.

(3) The Body may sue and be sued in its name.

(4) The Body shall comprise the developer and the purchasers.

[18] Similarly, MBMB is also a creature of statute. MBMB is a local authority created by virtue of s. 3 of the LGA 1976, which provides as follows:

Declaration and determination of status of local authority areas

3. For the administration of local government under this Act, the State Authority, in consultation with the Minister and the Secretary of the Election Commission, may by notification in the *Gazette*:

(a) declare any area in such State to be a local authority area;

(b) assign a name to such local authority area;

(c) define the boundaries of such local authority area; and

(d) determine the status of the local authority for such local authority area and such status shall be that of a Municipal Council or a District Council.

As regards the status of MBMB, s. 13 of the LGA 1976 provides that every local authority shall be a body corporate and shall have perpetual succession and a common seal, which may be altered from time to time, and may sue and be sued, acquire, hold and sell property and generally do and perform such acts and things as bodies corporate may by law do and perform.

[19] As a creature of statute, both entities have their own functions, duties and powers as stipulated in the statute that governs them. Section 8 of the BCPA 2007 clearly stipulated the duties and powers of JMB, where the main duty is to maintain the common properties and the main power is to collect the maintenance charges and contribution to the sinking fund. As for MBMB, its duties and powers are wider as a local authority. Section 101 of the LGA 1976 provides further powers of local authority which include carrying out any development, either by itself or with any other local authority or person, for residential, commercial, industrial or any other undertaking which the local authority may determine under para. 101(gg) of the LGA 1976.

[20] As regards to JMB's claim against MBMB, among the pleaded facts in the amended statement of claim (ASOC) filed by JMB are that:

(i) MBMB is the owner of the food court – see para. 3 of the ASOC;

(ii) JMB is obliged, among others, to maintain the common property, to determine and impose the maintenance and management charges, and to collect the maintenance and management charges under the BCPA 2007 – see para. 4 of the ASOC;

(iii) MBMB had failed to pay for the maintenance charges and contribution to the sinking fund for the years of 2012, 2013, 2014, 2016 and 2017, and that MBMB agreed to pay for the maintenance charges and contribution to the sinking fund for the years of 2012 to 2014 in the amount of RM715,163.40 subject to the approval of JMB's annual general meeting (AGM) – see para. 9 of the ASOC;

(iv) MBMB failed to pay the agreed amount instead of being informed of the approval given in JMB's AGM, which was held on 31 March 2016 – see para. 10 of the ASOC, and

(v) despite of notices sent, and finally a notice by KP Ng & Amardas, JMB's solicitor, dated 11 April 2017 giving grace period of 14 days to pay, MBMB still refused to make any payment – see para. 13 of the ASOC.

[21] Based on JMB's pleaded case, it is obvious that JMB is relying on the power given by the BCPA 2007 to establish its claim against MBMB. Even though JMB refers to the SMA 2013 at paras. 5 to 7 of the ASOC, it is clear that the SMA 2013 only came into force on 1 June 2015 in Malacca. Hence, JMB's claim which was for the year 2012 to 2014 should fall under the preview of the BCPA 2007 and not the SMA 2013. In other words, the source of power for JMB to act against MBMB for that material time must come from the BCPA 2007.

[22] Based on such fact, we are of the view that the second issue decided by the LJC as can be seen at paras. 14 to 19 in her grounds of judgment (GOJ), and the second issue argued by learned counsel for the appellant before us in this appeal (the second issue), that is, whether MBMB, which owns the food court, has any obligation to pay the maintenance charges and contribution to the sinking fund under the BCPA 2007, should first to be determined. The finding on the second issue would determine whether JMB has the power or right to launch the claim against MBMB.

[23] Related to the second issue at hand, we would like to reiterate the fact that JMB in its pleaded facts acknowledges that MBMB did not purchase the food court from the developer but owned it *via* the JVA with the developer.

[24] Before proceeding further on the second issue, we acknowledge the objection raised by learned counsel for JMB in his submission on the pleading point. It was argued that the averment that MBMB is not a "purchaser" pursuant to s. 2 of the BCPA 2007 and or s. 4 of Strata Titles Act 1985 – Act 318 (STA 1985) was never pleaded. It was only raised during trial, which was objected by learned counsel for JMB on the grounds that the specific legislations referred to were not pleaded.

[25] With due respect, we disagree with learned counsel for JMB's argument on the objection. In the re-amended statement of defence and amended counterclaim (RSOC & ACC) the fact that MBMB is not the developer or purchaser of the food court was clearly stated at sub-para. 4.17, even though it referred to the different statute, the SMA 2013 and not the BCPA 2007, and the STA 1985 was never mentioned. Then, at sub-para. 6.2 of the RSOC & ACC, MBMB pleaded the fact that it is not liable to pay the maintenance charges and contribution to the sinking fund since MBMB is not the developer or purchaser of the food court. Again, MBMB refer to the SMA 2013 instead of the BCPA 2007. From the pleaded facts, we are of the opinion that MBMB had sufficiently stated the facts of its defence, that is, MBMB is not liable to pay the charges under the law by virtue of its status, not as a developer or purchaser of the food court. These pleaded facts are sufficient to give notice to JMB and also to the court of its pleaded defence on the second issue. Even though MBMB mistakenly refers to the current law, SMA 2013, instead of the repealed law, BCPA 2007, we find that it is just a mistake that does not prejudice the right of JMB to know in advance the MBMB's defence on the second issue. We are of the view that the general rule on pleading under O. 18 r. 7(1) of the Rules of Court 2012 has been fulfilled.

[26] Furthermore, the second issue also involved the determination of the question of law. As to the question of law, even if it is raised for the first time before us at the appellate stage upon facts either admitted or proved beyond controversy, we may entertain answering the question of law raised in the interests of justice. See the decision of the Federal Court in *Gulwant Singh v. Abdul Khalik* [1965] CLJU 47; [1965] 1 LNS 47; [1965] 2 MLJ 55 per Thomson LP at p. 58 and *Lim Geak Liang v. East West Umi Insurance Bhd* [1997] 4 CLJ 405; [1997] 3 MLJ 517 per Mohamed Dzaiddin FCJ at p. 522. For reasons, we dismiss learned counsel for JMB's objection and proceeded to determine the second issue.

[27] As a basis for us to make a finding on the second issue, we will refer to several relevant statutes. To begin with, the words "owner" or "owner of a parcel" or "proprietor" are not mentioned anywhere in the BCPA 2007. Thus, there is no definition of such words in the interpretation s. 2 of the BCPA 2007. As a matter of fact, there are only two entities defined under s. 2 of the BCPA 2007, which are directly involved in the payment of the maintenance charges and contribution to the sinking fund to JMB. They are as follows:

(i) "developer" means any person or body of persons (by whatever name described), who develops any land for the purpose of accommodation including accommodation for commercial and industrial use and includes the executors, administrators and successors in title or permitted assigns of such person or body of persons; and

(ii) "purchaser" means the purchaser of a parcel.

[28] The question is, whether MBMB belongs to any one of these two entities? As already mentioned in the brief facts above, it is not disputed that MBMB is the owner of the master title, which had entered into the JVA to develop Plaza Hang Tuah with the developer. Based on that fact, does it mean that MBMB can be categorised as the first entity, because it developed Plaza Hang Tuah together with the developer? To determine this question, we need to refer to the interpretation of "housing developer", "housing development", "licensed housing developer" and "Housing Development Account" in the Housing Development (Control and Licensing) Act 1966 – Act 118 (HDA 1966). Section 3 of the HDA 1966 defined "housing developer", "housing development", "licensed housing developer" and "Housing Development Account" as follows:

> "housing developer" means any person, body of persons, company, firm or society (by whatever name described), who or which engages in or carries on or undertakes or causes to be undertaken a housing development, and in a case where the housing developer is under liquidation, includes a person or body appointed by a court of competent jurisdiction to be the provisional liquidator or liquidator for the housing developer;
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> "housing development" means to develop or construct or cause to be constructed in any manner whatsoever more than four units of housing accommodation and includes the collection of moneys or the carrying on of any building operations for the purpose of erecting housing accommodation in, on, over or under any land; or the sale of more than four lots of land or building lots with the view of constructing more than four units of housing accommodation;
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> "licensed housing developer" means any housing developer licensed under section 5 to engage in or carry on or undertake a housing development and includes the holder of any power of attorney of such housing developer duly created under the Powers of Attorney Act 1949 [Act 424];
>
> "Housing Development Account" means an account opened and maintained by a licensed housing developer pursuant to section 7A;

From the above definitions, a housing developer must be a legal entity that constructs a housing development of more than four units of houses for sale, involves the collection of money from buyers, is licensed, and maintains a housing development account. Based on the undisputed facts, none of these criteria apply to MBMB. MBMB only owns the master title, is not involved in the construction of Plaza Hang Tuah, is not licensed under the HDA 1966, and has not opened or maintained a housing development account. Therefore, MBMB is not a "developer" within the meaning of the BCPA 2007.

[29] Next, we have to look at the other entity who is directly obligated to pay the maintenance charges and contribution to the sinking fund under the BCPA 2007. Section 23 of the BCPA 2007 clearly provides that:

> Purchaser to pay maintenance charges
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> 23. (1) The purchaser shall pay the charges for the maintenance and management of the common property.
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> (2) The apportionment of the charges to be paid by the purchasers shall be determined by the Body in proportion to the allocated share units.
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> (3) Any written notice served on the purchaser requesting for the payment of the charges shall be supported by a statement of the charges issued by the developer or Body, as the case may be, stating in detail the categories of expenditure in respect of which charges are to be paid.
>
> (4) The purchaser shall, within fourteen days of receiving a notice under subsection (3), pay the charges requested for.
>
> (5) If the charges remain unpaid by the purchaser at the expiration of the period of fourteen days specified in subsection (4), the purchaser shall pay interest at the rate to be determined by the Body under paragraph 6(1)(d) but such interest shall not exceed 10 percent per annum.

According to the said definition, "purchaser" is simply defined as the purchaser of a parcel, with no further clarification or explanation provided to indicate that "purchaser" should also include the owner or proprietor of the parcel.

[30] The next question is, whether the words "purchaser" can include the "owner" or "proprietor" of the parcel under BCPA 2007? In interpreting a statute, we are aware of the fundamental principle that the words of a statute must be read in their entire context, in their grammatical and ordinary sense, and harmoniously blend with the scheme and the object of the statute and more importantly, the intention of the Legislature. In *Black-Clawson International Ltd v. Papierwerke Waldhof-Aschaffenburg AG* [1975] 1 All ER 310, Lord Reid had this to say:

> In this case it appears to me to be unusually important to consider as aids to construction all other material which the law allows us to look at, and I shall first state my view on that matter. We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament used. We are seeking not what Parliament meant but the true meaning of what they said. In the comparatively few cases where the words of a statutory provision are only capable of having one meaning, that is an end of the matter and no further enquiry is permissible.

In *Fothergill v. Monarch Airlines* [1980] 3 WLR 209 at p. 221, Lord Diplock said: A

> The constitutional function performed by courts of justice as interpreters of the written law laid down in Acts of Parliament is often described as ascertaining 'the intention of Parliament'; but what this metaphor, though convenient, omits to take into account is that the court, when acting in B its interpretative role, as well as when it is engaged in reviewing the legality of administrative action, is doing so as mediator between the state in the exercise of its legislative power and the private citizen for whom the law made by Parliament constitutes a rule binding upon him and enforceable by the executive power of the state. Elementary justice or, to use the concept often cited by the European court, the need for legal C certainty demands that the rules by which the citizen is to be bound should be ascertainable by him (or more realistically, by a competent lawyer advising him) by reference to identifiable sources that are publicly accessible. The source to which Parliament must have intended the citizen to refer is the language of the Act itself. These are the words which D Parliament has itself approved as accurately expressing its intentions. If the meaning of those words is clear and unambiguous and does not lead to a result that is manifestly absurd or unreasonable, it would be a confidence trick by Parliament and destructive of all legal certainty if the private citizen could not rely upon that meaning but was required to search through all that had happened before and in the course of the E legislative process in order to see whether there was anything to be found from which it could be inferred that Parliament's real intention had not been accurately expressed by the actual words that Parliament had adopted to communicate it to those affected by the legislation.

Back to our jurisdiction, the Federal Court in *R Rama Chandran v. Industrial Court Of Malaysia & Anor* [1997] 1 CLJ 147; [1997] 1 MLJ 145 quoted Lord Diplock in *Duport Steels Ltd & Ors v. Sirs & Ors* [1980] 1 WLR 142 at p. 157 when Wan Yahya FCJ had this to say at p. 219: F

> ... the role of the judiciary is confined to ascertaining from the words that Parliament has approved as expressing its intention what that intention was, and to giving effect to it. Where the meaning of the statutory words G is plain and unambiguous it is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient, or even unjust or immoral. In controversial matters such as are involved in industrial relations there is room for differences H of opinion as to what is expedient, what is just and what is morally justifiable. Under our constitution, it is Parliament's opinion on these matters that is paramount.

In construing a statutory provision where there is a *lacuna*, Abdul Hamid Omar LP made the following observation in the case of *Tan Kim Chuan & Anor v. Chandu Nair Krishna Nair* [1991] 1 CLJ 682; [1991] 1 CLJ (Rep) 441; [1991] 2 MLJ 42 at p. 44: I

A It would be the function of this court to interpret the statutes where there is a *lacuna* or an area of ambiguity. We need only interpret the law if the intention of the legislature is not clear. This time-honoured judicial trend has never been questioned by any authority and therefore before we exercise our power to interpret, we must be convinced that the words to be interpreted are loose or inexact. As the point raised is of vital B importance in future cases, we have given considerable attention to this point to do justice to the parties.

His Lordship further observed as follows:

We hasten to add that we are conscious that there are two schools of C thought relating to statutory interpretation. Lord Denning favoured a creative role for judges, taking on themselves the task of ascertaining the purpose of an act and the ironing out of creases which may appear. Lord Denning has observed in *Seaford Court Estates Ltd v. Asher* [1949] 2 KB 481 at p. 499 that:

> D it would certainly save the judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears a judge cannot simply fold his hands and blame the draftsman. He must set out to work on the constructive task of finding the intention of Parliament and he must do this not only from the language of the statute, but also E from a consideration of the social conditions which give rise to it and of the mischief which it was passed to remedy and then he must supplement the written word so as to give 'force and life' to the intention of the legislature.

The other school, notably Lord Simonds, did not share Lord Denning's approach and argued against such a creative role preferring to leave all F aspects of the legislative function to Parliament, 'if a gap is disclosed, the remedy lies in an amending Act' (*Magor & St Mellons RDC v. Newport Corp* [1952] AC 189).

In the same case Lord Morton of Henryton remarked that:

> G In so far as the intention of Parliament or of ministers is revealed in Acts of Parliament or Orders, either by the language used or by necessary implication, the courts should, of course, carry these intentions out; but it is not the function of any judge to fill in what he conceives to be the gaps in an Act of Parliament. If he does so, he is usurping the function of the Legislature.

H **[31]** For the purpose of the present appeal, we have carefully examined and deliberated on the issue of whether MBMB, as the owner of the food court, is obligated to pay JMB the maintenance charges and contribution to the sinking fund under the BCPA 2007. As already stated, the word "purchaser" does not have any other meaning than 'the purchaser of a parcel'. Indeed, all I provisions involving the right and liability to pay the maintenance charges and contribution to the sinking fund under the BCPA 2007 are only directed to the developer and "purchaser". Thus, which ever canons of construction

we apply to the meaning of the "purchaser" under BCPA 2007, the result will be the same, that is, "purchaser" does not refer to the owner of the parcel who did not purchase it from the developer.

[32] As a comparison, we refer to the definition of "purchaser" in the interpretation section in s. 3 of the HDA 1966 which provides as follows.

> "purchaser" means any person who purchases housing accommodation or who has any dealing with a licensed housing developer in respect of the acquisition of housing accommodation;

From the said definition, even though the word "owner" or "proprietor" is not mentioned, we can, without difficulty, read and understand that the phrases "any person who has any dealing with a licensed housing developer in respect of the acquisition of housing accommodation" refer to the owner or proprietor of a house, or in our case, the owner or proprietor of a parcel by using purposive canons of construction or even by literal meaning of the said phrases.

[33] If the Legislature had intended to include the "owner" or the proprietor of a parcel as one of the categories of person that is liable to pay the maintenance charges and contribution to the sinking fund under the BCPA 2007, it can even adopt the same interpretation of "purchaser" that being used in the HDA 1966 since such interpretation of "purchaser" is wide enough to include "owner". As a matter of fact, the HDA 1966 had been enacted way before the enactment of the BCPA 2007. It is absurd to say that the Legislature is not aware of such interpretation of "purchaser" in the HDA 1966 when they enacted the BCPA 2007.

[34] Alternatively, it is better for the Legislature to spell out clearly the liability of the owner or proprietor of a parcel to pay the maintenance charges and contribution to the sinking by defining the word "owner" or "proprietor" in the BCPA 2007. For example, we refer to the interpretation of the word "owner" used in the LGA 1976 as follows:

> "owner":
>
> (a) in relation to any land or building, means the registered proprietor of the land and, if in the opinion of the local authority the registered proprietor of the land cannot be traced, the person for the time being receiving the rent of the premises in connection with which the word is used whether on his own account or as agent or trustee for any other person or as receiver or who would receive the same if such premises were let to a tenant; and
>
> (b) in the case of subdivided buildings, includes the management corporation and any subsidiary proprietor;

Then, we refer to the interpretation of the word "proprietor" used in STA 1985 as follows:

> "proprietor" refers to a parcel proprietor, that is to say, a person or body for the time being registered as the proprietor of a parcel, as well as to the proprietor of a provisional block, that is to say, a person or body for the time being registered as the proprietor of a provisional block unless expressly provided otherwise;

With some modification to suit the purpose, the word "owner" or "proprietor" of a parcel should be used and interpreted in the BCPA 2007 to show the intention of the Legislature to include "owner" or "proprietor" of a parcel in the scheme of the payment of the maintenance charges and contribution to the sinking fund. This was not done.

[35] Even though it can be argued that for the purposive approach, MBMB, as the "owner", is liable to pay the maintenance charges and contribution to the sinking fund since they had enjoyed the usage of the common properties maintained by JMB, but the BCPA 2007 did not empower JMB to collect those charges. In interpreting a statute, the courts cannot usurp the power of the Legislator to make, mend, reframe or modify it. Lord Denning in *London Transport Executive v. Betts* [1959] AC 213 at p. 247 said:

> The judges have no right to fill in gaps which they supposed to exist in an Act of Parliament, but must leave it to Parliament itself to do so; see *Magor and St Mellons Rural District Council v Newport Corporation* [1952] AC 189, [1951] All ER 839. No court is entitled to substitute its words of the Act (see *Goodrich v. Paisner* [1957] AC 65 at p 88, [1956] 2 WLR 1053). ... the business of the courts is to see what Parliament had said, instead of reading into an Act what ought to have been said (per Lord Coleridge CJ in *R v. Mansel Jones* (1889) 23 QBD 29 at p 32.

Much earlier, Lord Brougham, sitting in the Judicial Committee of the Privy Council in *Crawford v. Spooner* [1846] 6 Moore PC 1 at p. 9; 13 ER 582 at p. 585, had pointed out that:

> ... the construction of the Act must be taken from the bare words of the Act. We cannot fish out what possibly may have been the intention of the Legislature; we cannot aid the legislature's defective phrasing of an Act, we cannot add and mend, and, by construction, make up deficiencies which are left there.

[36] In the upshot, upon reading it in its entirety, and carefully examining the relevant provision related to the obligation to pay the maintenance charges and contribution to the sinking under the BCPA 2007, we are of the considered view that the word "purchaser" as interpreted in s. 2 the BCPA 2007 did not include the "owner" or "proprietor" of a parcel. Thus, we find that there is no provision that gave power to JMB to demand payment of the maintenance charges and contribution to the sinking fund from MBMB under the BCPA 2007.

[37] To further justify our view on this issue, the fact that the BCPA 2007 was repealed by SMA 2013 is pertinent. Under the interpretation in s. 2 of the SMA 2013, the definition of "purchaser" is as follows:

> "purchaser" means the purchaser of a parcel and includes any person or body who has acquired an interest as a purchaser in the parcel or any person or body for the time being registered as a parcel owner in the register of parcel owners under subsection 30(1);

Meanwhile, sub-s. 30(1) of the SMA 2013 reads as follows:

> Register of parcel owners
>
> 30. (1) A developer, during the developer's management period, or the joint management body, as the case may be, shall prepare and maintain a register in such form as the Commissioner may require, containing the following particulars in respect of all the parcels in the development area:
>
> (a) the allocated share units assigned to each parcel;
>
> (b) the floor area of the parcel referred to in paragraph (a);
>
> (c) the name and address of every parcel owner and if the parcel owner is not a resident of Malaysia, the address in Malaysia at which notices may be served on the parcel owner; and
>
> (d) the name and address of the solicitor acting for the parcel owner in the sale and purchase of the parcel, if any.

In defining the word "purchaser" in the SMA 2013, the Legislature includes the words "any person or body for the time being registered as a parcel owner in the register of parcel owners under sub-s. 30(1)" which without doubt refer to all parcel owners as registered under the register required under sub-s. 30(1) of the SMA 2013. Comparing the definition of "purchaser" in the BCPA 2007, which is the previous law, and SMA 2013, which is the new law, it is obvious that the *lacuna* in the previous law as to the status of the owner of the parcel, in relation to the obligation to pay the maintenance charges and contribution to the sinking fund in the previous law had been addressed.

[38] For the above reasons, we find that there is merit in learned counsel for MBMB's argument on the second issue. In the GOJ at paras. 14 to 19, the second issue was not properly addressed by the LJC. The question for determination on the second issue based on MBMB's pleaded facts, that is, whether MBMB is a 'purchaser' that is obligated to pay the maintenance charges and contribution to the sinking fund under the scheme of BCPA 2007 had not been correctly answered. From our deliberation on this point of law, it is clear that MBMB had no obligation to pay and JMB had no power to collect the maintenance charges and contribution to the sinking fund under BCPA 2007. Based on this finding alone, we must allow MBMB's appeal.

[39] For completeness, we will briefly discuss the other issues raised by learned counsel for MBMB. For the first issue on PAPA 1948, we are not with learned counsel for MBMB's argument. Payment of the maintenance charges and contribution to the sinking fund is an obligation under a specific law, that is, BCPA 2007 previously and presently under the SMA 2013. The obligation to pay is on the "purchaser" of the parcel. If MBMB is the purchaser of the food court which is also a parcel under the master title, the obligation to pay the maintenance charges and contribution to the sinking fund is mandated by BCPA 2007, MBMB is statutorily obliged to pay. Payment of those charges had nothing to do with the MBMB's public duty. The fact that MBMB was expressly empowered to develop the master title under paras. 101(gg) and (hh) of the LGA 1976, does not negate MBMB's duty to pay those charges under BCPA 2007 if MBMB is categorised as a "purchaser" of the food court. Furthermore, statement of account for the maintenance charges and contribution to the sinking fund are running accounts, and therefore, MBMB cannot rely on the defence of limitation under PAPA 1948 or the Limitation Act 1953. See our decision in *Ekuiti Setegap Sdn Bhd v. Plaza 393 Management Corporation* [2019] 2 CLJ 592; [2018] 4 MLJ 284.

[40] For the third issue, whether JMB has proven its claim on the 'share units' basis mandated by the BCPA 2007 and STA 1985, we are also not with learned counsel for MBMB's argument. From the undisputed fact, the developer had been wound up and no licensed land surveyor was appointed by the developer at that material time to assign the share units of the parcel to the purchaser. When JMB was formed, with the advice of the COB, JMB then took it upon themselves to appoint a licenced land surveyor to allocate the share units which was done on 5 January 2015. MBMB, as the proprietor of the strata title parcels for the food court with the total area of 13,509 sq ft, was assigned with total share of 1,883 units. At the time JMB filed the claim against MBMB on 9 June 2017, the assignment of the share units to the food court had been done. On this issue, we are of the view that JMB had taken the right step to appoint the licensed land surveyor to allocate the share units since the developer is no longer in existence. JMB is the right person or body to step into the shoes of the wound-up developer and to act in accordance to the law to enable the maintenance of the Plaza Hang Tuah.

[41] Finally, the fourth issue is whether there is *consensus ad idem* on the contract alleged to have been entered into between the parties by virtue of the 2015 agreement? On this issue, it is trite that the contracting out the provision of a statute is forbidden and the contract entered will be void. As a matter of fact, s. 149 of the SMA 2013 clearly prohibited a contracting out when it provides as follows:

149. Contracting out prohibited

(1) The provisions of this Act shall have effect notwithstanding any stipulation to the contrary in any agreement, contract or arrangement entered into after the commencement of this Act.

(2) No agreement, contract or arrangement, whether oral or wholly or partly in writing, entered into after the commencement of this Act shall operate to annul, vary or exclude any of the provisions of this Act.

MBMB's agreement to make payment or not, is irrelevant if it is obliged under the law to pay the maintenance charges and contribution to the sinking fund under BCPA 2007. In a recent case of *Lai Chin Wah & Anor v. Sitrac Corporation Sdn Bhd* [2023] 6 CLJ 232; [2023] 5 MLJ 351, this court had this to say: "To allow parties to contract out of an Act of Parliament would be to allow parties to thumb their nose at the Legislators and effectively to circumvent the intention of the Legislators". In our case, the Legislature has an interest in ensuring certainty of the payment of charges to maintain the strata buildings in our country by enacting the BCPA 2007, which was later replaced by SMA 2013. The purchaser's obligation to pay is mandatory in both the statutes. The word "shall" is used in s. 23 of the BCPA 2007, the previous law, and in s. 25 of the SMA 2013, the present law. Surely, contracting out of such obligation will go against the intention of the Legislator. We are of the view that the 2015 agreement is void and unenforceable.

MBMB's Counterclaim

[42] MBMB is claiming for the restitution of the sum of RM249,115.30 in its counterclaim being the maintenance charges and contribution to the sinking fund paid for the year 2015. The only reason given is that, JMB failed or refused to carry out maintenance works to the common property serving MBMB's food court. Therefore, there is a total failure of consideration on JMB's part to keep the sum paid by MBMB.

[43] In considering MBMB's counterclaim, we would reiterate that under BCPA 2007, MBMB had no obligation to pay the maintenance charges and contribution to the sinking fund to JMB, and at the same time, we also look at the fact that the SMA 2013 only came into force in Malacca on 1 June 2015. From these two facts, it is clear that before 1 June 2015, JMB has no power to collect or make any claim for the payment of the maintenance charges and contribution to the sinking fund from MBMB. In other words, only after the cut-off date, that is 1 June 2015, JMB is empowered under the SMA 2013 to make such collection. Therefore, we are of the view that MBMB should get back part of the money paid to JMB. The calculation should be: RM249,115.30 divided by 12 months for the year 2015 = RM20,759.60, multiple with five months prior to 1 June 2015 = RM103,798.

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Conclusion

[44] For all the above reasons given, we find merits in MBMB's appeal, which warrants appellate intervention. For JMB's main claim against MBMB in the amount of RM715,163.40, the appeal is allowed and the order of the High Court set aside. As regards to MBMB's counterclaim, we allow MBMB's appeal in part. JMB is ordered to pay back the sum of RM103,798 out of RM249,115.30 to MBMB. We also allow costs in the sum of RM30,000 here and below to MBMB.

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